PEMUNGUT DUTI SETEM MALAYSIA v. PERBADANAN PEMBANGUNAN PULAU PINANG

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
S NANTHA BALAN JCA
GUNALAN MUNIANDY JCA
[CIVIL APPEAL NO: K-01(NCvC)(A)-809-12-2021]
13 MAY 2024

Abstract – *In an application for stamp duty remission on a financing agreement, the instrument which is entitled for a remission is, inter alia, a loan instrument without security repayable on demand. The word 'security' in a remission order is not limited to instruments which form an encumbrance on property which the lender can rely on for the purpose of securing the repayment of a debt, but has a wider meaning where it also includes the undertaking and guarantee provided by a third party. As such, a facility agreement, secured by a letter of undertaking issued by a State Government, constitutes a security for a loan and provides a complete assurance for the repayment of a loan. Since the loan instrument is secured by a State Government's letter of undertaking, it therefore does not fall within a remission order.*

REVENUE LAW: *Stamp duty – Remission order – Entitlement – Loan obtained by state entity – Whether facility agreement secured by letter of undertaking from State Government – Whether State Government accountable for loan facility – Whether letter of undertaking a separate instrument serving as clear assurance that State Government would take full responsibility for loan amount – Whether letter of undertaking provides exceptional security for repayment of loan amount – Whether loan instrument fell within remission order*

WORDS AND PHRASES: *'security' – Meaning of – 'Security' in remission order – Whether ought to be given wide meaning – Whether limited to instruments forming encumbrance on property which lender could rely on for purpose of securing repayment of debt – Whether includes undertaking and guarantee provided by third party*

The respondent was a State entity. Section 15 of the Penang Development Corporation Enactment 1971 stipulates that the respondent could not apply for any loans except with prior written approval from the Minister of Finance (MOF), and the MOF may impose any conditions deemed necessary on such approval. According to the MOF directive issued under para. 14(1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962, the State Government must provide an undertaking that it would fully guarantee the loan obtained by a State entity. The respondent applied for and obtained an Islamic Tawarruq banking facility of

RM100,000,000 ('loan') from the bank *via* a letter of offer dated 6 May 2019. Additionally, in the Murabahah Financing Agreement, there was also a specific requirement to provide a guarantee to secure the said loan, to be provided by a third party, namely the Penang State Government. Pursuant to the terms of the letter of offer issued by the bank, the respondent was required to submit a letter of undertaking ('LOU') from the Penang State Government to the MOF stating that the State Government would be responsible for the financing facility offered by the bank. On 5 July 2019, the Penang State Government through the State Government (Executive Council Meeting) ('Exco meeting'), which was ratified on 12 July 2019, had agreed to approve the proposal of the loan facility amounting to RM100 million from the bank to the respondent. Following that, a LOU dated 9 August 2019 was sent by the Penang State Finance Department to the MOF stating that the State Government pledged to fully guarantee the loan facility of RM100 million from the bank. Upon compliance with the terms of the offer letter from the bank, including the issuance of the LOU dated 9 August 2019 by the Penang State Finance Department, a Murabahah Financing Agreement dated 1 September 2020 was signed by the respondent and the bank. On the same day, the respondent applied for stamp duty remission from the appellant on the Murabahah Financing Agreement in accordance with the Stamp Duty (Remission) Order (No. 2) 2012 (Remission Order 2012). This application for the remission of stamp duty chargeable was rejected by the appellant. The respondent, however, submitted further explanation to the appellant *via* a letter, elucidating, *inter alia,* (i) the financing facility amounting to RM100 million was an unsecured financing; (ii) repayment of the financing facility was made in a lump sum; and (iii) the duty imposed on the Murabahah Financing Agreement was in accordance with item 22(1)(b) of the First Schedule of the Stamp Act 1949 ('Stamp Act'). The appellant, however, maintained the stance of not allowing the stamp duty remission application requested by the respondent. Therefore, the appellant issued a security estimation notice (*ad valorem* duty) regarding the Murabahah Financing Agreement ('*ad Valorem* estimation notice'). The respondent then commenced an appeal under s. 39 of the Stamp Act to the High Court. The High Court, in allowing the respondent's appeal, held that the LOU was not a 'security' and the facility agreement was entitled to the remission of stamp duty under the remission order. Hence, this appeal by the appellant.

Held (allowing appeal with costs)
Per Azizah Nawawi JCA delivering the judgment of the court:

(1) Any facility agreement is subject to stamp duty pursuant to item 22(1)(b) of the First Schedule to the Stamp Act read with item 27(a)(iii). However, the respondent may apply for a remission based on a remission order issued by the Minister under s. 80(2) of the Stamp Act, the Stamp Duty (Remission) (No. 2) Order 2012. Under the remission order, the instrument which is entitled for a remission is an instrument

fulfilling the following criteria (i) loan agreement or loan instrument without security repayable on demand; or (ii) loan agreement or loan instrument without security repayable in single bullet repayment. The respondent's facility agreement was secured by the LOU from the Penang State Government as provided in the conditions precedent of the letter of offer dated 6 May 2019 and para. D(1) of the Third Schedule of the Facility agreement. (paras 23-26)

(2) The word 'security' must be given a wide meaning. Despite the respondent's reliance on both the letter of offer and the facilities agreement stating 'Security: Nil', both documents ought to be read as a whole. The conditions precedent of the letter of offer dated 6 May 2019 and para. D(1) of the Third Schedule to the facility agreement clearly stated the requirement of the LOU issued by Penang State Government *via* the Jabatan Kewangan Negeri to MOF that the State Government is to be accountable for the facility of RM100,000,000 with the bank. The matter of concern for the remission order was not the loan agreement or loan instrument itself but whether there was in existence another instrument that creates an obligation to pay a sum or sums of money on demand or in a single bullet payment. It is only where such instrument exists that entitlement to a remission of stamp duty is excluded by the remission order. Therefore, for the purposes of the remission order, there must be a separate instrument that creates an obligation 'for any sum or sums of money repayable on demand or in single bullet repayment'. The intent and purpose of that separate instrument must be ascertained whether it falls within the ambit of the remission order. The LOU issued by the Penang State Government to the MOF on 9 August 2019 was a separate instrument that served as a clear assurance that the State Government would take full responsibility for the loan amount. (paras 38-45)

(3) The intent and purpose of the LOU was the Penang State Government's undertaking to be responsible for the loan and it explicitly secured the repayment of the loan facility to the bank. As a result of this assurance provided to the MOF, the payment of the RM100 million facility was guaranteed by the State Government. Additionally, the LOU provides a guarantee to the bank that the respondent had the capability to repay the loan amount at all times. Thus, the LOU served as security for the facility agreement in multiple ways. (paras 45 & 46)

(4) Even though the LOU was a letter between the Penang State Government and the MOF, it explicitly guaranteed the entire RM100 million loan provided by the bank to the respondent. The LOU from the Penang State Government provides an exceptional security and a complete assurance for the repayment of the loan amount. The State Government bore full responsibility for the loan amount and, as such,

ensured that agencies under its jurisdiction, such as the respondent, maintain strong financial capability at all times to enable the repayment of the loan amount to the bank. (para 47)

(5) The facility agreement was secured by the LOU issued by the State Government to the MOF. The bank is a Federal Government GLC, whilst the respondent was a State entity. Hence, the relationship between the bank and the respondent was not strictly commercial, but were guided by Government policies. Therefore, instead of the usual security in the nature of mortgages or charges, the letter of offer issued by the bank specified the requirement of a LOU from the State Government, in compliance with the Federal Government policy. This was also clearly stated in the Third Schedule of the facilities agreement. Thus, the LOU issued by the State Government constituted a security for the said RM100 million loan. The word 'security' in the remission order has a wider meaning where it also includes the undertaking and guarantee provided by a third party. Therefore, since the loan instrument was secured by the Penang State Government's LOU, it did not fall within the remission order. (paras 49 & 50)

Case(s) referred to:

BASF Services (M) Sdn Bhd v. Pemungut Duti Setem [2010] 5 CLJ 109 FC ***(refd)***

Galaxy Energy Technologies Sdn Bhd v. Timbalan Pemungut Duti Setem, Malaysia & Anor [2011] 5 CLJ 829 CA ***(refd)***

Lim Teck Lee v. The Commissioner Of Stamps [1956] CLJU 58; [1956] 1 LNS 58 ***(refd)***

Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem [2017] 10 CLJ 66 CA ***(dist)***

Legislation referred to:

Incorporation (State Legislatures Competency) Act 1962, Second Schedule, para. 14(1)(d)

Penang Development Corporation Enactment 1971, s. 15C

Stamp Act 1949, ss. 4(1), 39(1), 80(2), First Schedule, items 22(1)(b), 27(a)(iii)

For the appellant - Hazlina Hussain, Ahmad Isyak Mohd Hassan & Mohamad Asyraf Zakaria; RC

For the respondent - Quah Boon Nee & Mohd Farid Azahari; M/s JB Lim & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: KB-24NCvC-97-12-2020 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Azizah Nawawi JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge delivered on 30 November 2021, allowing the appeal by the respondent, Penang State Development Corporation, pursuant to s. 39(1) of the Stamp Act 1949 (Revised 1989) ('the Stamp Act').

The Salient Facts

[2] The respondent is a corporation established under the Incorporation (State Legislatures Competency) Act 1962 and the Penang Development Corporation Enactment 1971 (PDC Enactment). The respondent is a State entity.

[3] Section 15C of the PDC Enactment stipulates that the respondent cannot apply for any loans except with prior written approval from the Minister of Finance (MOF), and the MOF may impose any conditions deemed necessary on such approval.

[4] According to the MOF directive dated 19 November 1999 issued under para. 14(1)(d) of the Second Schedule of the Incorporation (State Legislatures Competency) Act 1962, the State Government must provide an undertaking that it will fully guarantee the loan obtained by a State entity.

[5] The respondent had applied for and had obtained an Islamic Tawarruq banking facility of RM100,000,000 ("loan") from Bank Islam Malaysia Berhad ("bank") *via* a letter of offer dated 6 May 2019. In the said letter of offer, it is clearly specified that the offer is subject to the terms and conditions, including:

> **Security**
>
> the security provided by the Security Party to the Bank in respect of the obligations and liabilities of the Customer (including but not limited to the payment of the Indebtedness) under and in connection with the Facility and particularized in Section 7 of the First Schedule and any other security for the time being or from time to time constituting security for the obligations and liabilities (including but not to limited to the payment of the indebtedness) of the Customer under and in connection with the facility.
>
> **Condition Precedents:**
>
> A. The Customer shall have executed and/or submitted the followings:
>
> …
>
> 6) Letter of Undertaking from Penang State Government *via* Jabatan Kewangan Negeri to Ministry of Finance that the State Government is to be accountable for the RC-I facility of RM100 million with Bank Islam.

[6] Additionally, in the Murabahah Financing Agreement, there is also a specific requirement to provide a guarantee to secure the said loan, to be provided by a third party, namely the Penang State Government.

[7] Pursuant to the terms of the letter of offer issued by the bank, the respondent is required to submit a letter of undertaking ("LOU") from the Penang State Government to the MOF stating that the State Government will be responsible for the financing facility offered by the bank.

[8] On 5 July 2019, the Penang State Government, through the State Government Executive Council Meeting ("Exco Meeting") Number 20/2019, which was ratified on 12 July 2019, had agreed to approve the proposal of the loan facility amounting to RM100 million from the bank to the respondent.

[9] Following that, an LOU dated 9 August 2019 was sent by the Penang State Finance Department to the MOF stating that the State Government pledges to fully guarantee the loan facility of RM100 million from the bank:

> Ketua Setiausaha Perbendaharaan
> Kementerian Kewangan Malaysia
> Bahagian Pengurusan Strategik Badan Berkanun
> Aras 4, Blok Tengah
> Kompleks Kementerian Kewangan No. 5,
> Persiaran Perdana, Presint 2
>
> 62594 PUTRAJAYA
>
> (u.p: Encik Mohd Sakeri bin Abdul Kadir)
>
> Tuan
>
> **Surat Akujanji Ke Atas Permohonan Mengenai Kemudahan Pinjaman Kredit Tidar Berjumlah RM100 Juta Dari Bank Islam Malaysia Bhd Oleh Perbadanan Pembangunan Pulau Pinang (PDC)**
>
> Dengan segala hormatnya saya merujuk kepada perkara di atas.
>
> 2. Adalah dimaklumkan bahawa Kerajaan Negeri Pulau Pinang, melalui Majlis Mesyuarat Kerajaan Negeri (MMK) Bilangan 20/2019 pada 5 Julai 2019 yang disahkan pada 12 Julai 2019 telah bersetuju meluluskan cadangan mengenai Kemudahan Pembiayaan Kredit Tidar berjumlah RM100 Juta daripada Bank Islam Malaysia Bhd oleh Perbadanan Pembangunan Pulau Pinang (PDC).
>
> 3. **Sehubungan itu, Kerajaan Negeri memberi akujanji untuk bertanggungjawab sepenuhnya ke atas pinjaman Kredit Tidar berjumlah RM100 Juta daripada Bank Islam Malaysia Berhad tersebut.**
>
> Sekian, terima kasih.
>
> "Cekap, Akauntabiliti, Telus"
> "Berkhidmat Untuk Negara"
>
> Saya yang menjalankan amanah
>
> (Dato' Sarul Bahiyah binti Haji Abu)
> Kewangan Negeri Pulau Pinang
> Pengurus Besar
> Perbadanan Pembangunan Pulau Pinang No. 1 Persiaran Mahsuri
> Bandar Bayan Baru
> 11909 Pulau Pinang (emphasis added)

[10] Upon compliance with the terms of the offer letter from the bank, including the issuance of LOU dated 9 August 2019 by the Penang State Finance Department, a Murabahah Financing Agreement dated 1 September 2020 was signed by the respondent and the bank.

[11] On the same day, the respondent applied for stamp duty remission from the appellant on the Murabahah Financing Agreement in accordance with the Stamp Duty (Remission) (No. 2) Order 2012 (Remission Order 2012).

[12] This application for the remission of stamp duty chargeable was rejected by the appellant.

[13] The respondent, however, through their attorney, JB Lim & Associates, submitted further explanation to the appellant *via* a letter dated 2 September 2020, elucidating as follows:

(i) the financing facility amounting to RM100 million is an unsecured financing;

(ii) repayment of the financing facility is made in a lump sum; and

(iii) the duty imposed on the Murabahah Financing Agreement is in accordance with item 22(1)(b) of the First Schedule of the Stamp Act 1949.

[14] After considering the respondent's explanation, the appellant maintained the stance of not allowing the stamp duty remission application requested by the respondent. Therefore, the appellant issued a security estimation notice *(ad valorem* duty) dated 24 September 2020, regarding the Murabahah Financing Agreement ("*ad valorem* estimation notice").

[15] The respondent then commenced an appeal under s. 39 of the Stamp Act 1949 to the High Court. In its appeal by way of case stated, the respondent sought the following reliefs:

(1) bahawa defendan diarahkan untuk menyatakan dan menandatangani satu kes yang menyatakan soalan-soalan di mana pendapatnya diperlukan dan keputusan yang dibuat olehnya;

(2) bahawa Surat Tawaran daripada Bank Islam Malaysia Berhad [No. Syarikat: 198301002944 (98127-X)] (Bank Islam) kepada Perbadanan Pembangunan Pulau Pinang (Plaintif) bertarikh 6 Mei 2019 dan Tawarruq Facility Agreement di antara Bank Islam dan Plaintif bertarikh 1 September 2020 (Perjanjian Pembiayaan Tawarruq) layak untuk mendapat peremitan amaun duti setem melebihi 0.1% di bawah Perintah Duti Setem (Peremitan) (No. 2) 2012 bagi kemudahan pembiayaan sebanyak RM100,000,000.00;

A (3) bahawa sekiranya Perjanjian Pembiayaan Tawarruq layak untuk menuntut peremitan di bawah Perintah Duti Setem (Peremitan) (No. 2) 2012, duti setem yang telah terlebih bayar atas Perjanjian Pembiayaan bagi kemudahan pembiayaan sebanyak RM100,000,000.00 dikembalikan/dibayar balik oleh Defendan kepada Plaintif; dan

B (4) bahawa rayuan Plaintif di bawah Seksyen 39 Akta Setem 1949 dibenarkan; bahawa kos-kos untuk rayuan ini dibayar oleh Defendan kepada Plaintif.

[16] The only issue for the High Court's determination as stated in the case stated is as follows:

C whether the Tawarruq Facility Agreement for the amount of RM100 Million of which the Penang State Government is giving an undertaking (referred to as guarantee by the Defendant) (hereinafter referred to as "the Letter of Undertaking") to the Minister of Finance to be fully responsible for the Facility amount of RM100 Million is entitled for the remission of stamp duty under the Stamp Duty (Remission) (No. 2) Order D 2012 [P.U. (A) 258/2012].

Decision Of The High Court

[17] On 30 November 2021, the learned judge allowed the respondent's appeal. The learned judge held that the LOU is not a 'security' and the E facility agreement is entitled for the remission of stamp duty under the remission order. Her Ladyship held as follows:

17. *In my view, based on the authority of Muhibbah, it is safe to conclude that in determining whether or not an instrument is a 'security' for the purpose of the Stamp Act, the Court should enquire whether the instrument is an encumbrance on property* F *with which the lender can rely on to enforce and to recover the sum loaned under credit facility.* If the answer is in the affirmative, then that instrument is 'security'. Conversely, if the answer is in the negative, that instrument cannot amount to a security under the Stamp Act and, accordingly, the taxpayer is entitled to a remission under the Remission Order.

G 18. In the case before me, the letter in dispute was a letter of undertaking, or to use a more appropriate word a letter of assurance, issued by the State Government to the Ministry of Finance in compliance to the latter's letter of approval to PDC. I am unable to see how Bank Islam can rely on this letter of undertaking to secure a repayment of the loan as there is no privity of contract between Bank Islam and/or the Ministry of H Finance. The letter of undertaking, therefore, cannot amount to a security for the purpose of the Stamp Act. (emphasis added)

Our Findings

[18] The governing principle is that stamp duty strikes at instruments rather than transactions. This is entrenched in s. 4(1) of the Stamp Act 1949 I which provides that:

> 4(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with several duties specified in such Schedule.

[19] The above principle is established by the decision of the court in *Lim Teck Lee v. Commissioner of Stamps* [1956] CLJU 58; [1956] 1 LNS 58; [1956] 1 MLJ 135, where the Court of Appeal held:

> The fundamental principle is this. The Stamp Act taxes instruments, not transactions. If there are two ways of carrying out a transaction and the parties are content with the simpler, they are entitled to carry it out in that way.

[20] In *Galaxy Energy Technologies Sdn Bhd v. Timbalan Pemungut Duti Setem, Malaysia & Anor* [2011] 5 CLJ 829, this court held a similar view:

> [19] The cardinal principle of stamp duty is that stamp duty is chargeable on the instrument and not transactions. As Finley J in *Prudential Assurance Co v. Inland Revenue Commissioners* [1935] 1 KB 101 said:
>
> > The rule which must not be forgotten – namely, that under the Stamp Act one stamps, not transactions or anything of that sort, but one stamps instrument.

[21] In the case of *BASF Services (M) Sdn Bhd v. Pemungut Duti Setem* [2010] 5 CLJ 109; [2010] 4 MLJ 596, the Federal Court held that:

> [18] Now that this court has identified the transfer form as the instrument that is chargeable to stamp duty, the next step is to decide on whether the infrastructure fees are part of the consideration of the agreement and hence liable under item 32(a).
>
> It is generally acknowledged that the real substance of a transaction may not successfully be appreciated by mere perusal of a document, or by a hurried gauging of the machinery adapted by the parties of the transaction. Only after going through the exercise of construing the document as a whole may the real substance of that transaction be known and thenceforth ascertain the respective parties' rights and obligations, and the correctness of the respondent's adjudication (*Inland Revenue Commissioners v. Duke of Westminster* [1936] AC 1; *Pernas Securities Sdn Bhd v. The Collector of Stamp Duties* [1976] 2 MLJ 188). *CC Gallagher Highmore's Stamp Laws* (4th Ed) at p 7 authored:
>
> > General Rules as to Stamp Duties.
> >
> > In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial … For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note

A thereinafter written, yet if in truth the contract set forth was not a promissory note, but an agreement of another character, the stamp duty would be not that of a promissory note, but of the agreement. The question therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing. It is sufficient to refer to the B case of *Rex v. Inhabitants of Ridgwell* [1827] 6 B & C 665, to establish this proposition.

[19] In *Stanway Limited v. Collector of Stamp Duties, Ipoh* [1931-32] FMSLR 239, Throne Ag CJ said:

C Now I would here remark that under the provisions of the Stamp Enactment the parties to an instrument become liable to pay duty upon the instrument made between them, having regard to the effect of the instrument, and they cannot avoid payment of the proper duty by using a form of instrument to carry into effect the transaction which, though in name falls within one category, by its D effect into another.

[20] In *Tan Kay Thye & Ors v. Commissioner of Stamp Duties* [1991] 3 MLJ 150, likewise echoed the sentiments of *CC Gallagher's Highmore's Stamp Laws* when the case of *Limmer Asphalte Paving Company Limited v. Commissioners of Inland Revenue* (1872) LR 7 Exch 211 was quoted by the court to establish the point that what parties called a document was not E important. In the current appeal, the fact that the agreement carries the title 'Purchase, Sale, Development and Infrastructure Agreement' and implying three possible separate agreements, is not decisive. It is the effect and substance of the agreement that counts (*Commissioners of Inland Revenue v. Glasgow and South-Western Railway Company* (1887) 12 App Cas 315; *The Law of Stamps on Deeds and other Instruments EN Alpe* (12th Ed)). F

[22] From the above cases, for the court to determine whether the stamp duty levied on an instrument is correctly imposed by the Collector, the following matters must be taken into account before the court could come to a finding:

G (i) the name, title, label or description given to the instrument/document (label) by the parties in question is not conclusive. The court is not bound by the label and may go behind the label to determine the true nature of the instrument/document;

H (ii) the court has to construe the instrument/document as a whole;

(iii) in addition to the instrument/document, the court may consider all relevant documents (relevant documents) so as to ascertain the true nature of the instrument/document;

(iv) in deciding the true nature of the instrument/document, the court may I consider all relevant circumstances regarding the instrument/document (relevant circumstances); and

(v) in considering the instrument/document, relevant documents and relevant circumstances, the court determines the following matters:

(a) what is the true nature of the rights and obligations of the parties?;

(b) what is the effect of the instrument/document, relevant documents and relevant circumstances?; and

(c) what is the substance of the instrument/document?

[23] It is common ground that any facility agreement is subject to stamp duty pursuant to item 22(1)(b) of the First Schedule to the Stamp Act 1949 read with item 27(a)(iii), which reads as follows:

Item	Description of Instrument	Proper Stamp Duty
22	BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:	
	(1)(a) … not relevant …	RM1.00
	(b) for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack	The same *ad valorem* duty as a charge or mortgage for such total amount.
27	CHARGE OR MORTGAGE, AGREEMENT FOR A CHARGE OR MORTGAGE (including that under the Syariah), BOND, COVENANT, DEBENTURE (not being a marketable security) BILL OF SALE by way of security and WARRANT OF ATTORNEY to confess and enter up judgment:	
	(a) Being the only or principal or primary security (other than an equitable mortgage or an assignment of receivables or the kind mentioned in paragraph (d)) for the payment or repayment of money –	
	(i) …	
	(ii) …	
	(iii) in any other case –	
	For each RM1,000 or part thereof	RM5

[24] However, the respondent may apply for a remission based on a remission order issued by the Minister under s. 80(2) of the Stamp Act 1949, the Stamp Duty (Remission) (No. 2) Order 2012 [PU(A) 258/2012], which provides as follows:

A

> 2. The amount of stamp duty that is chargeable under subsubitem 22(1)(b) of the First Schedule to the Act upon a loan agreement or loan instrument without security for any sums or sums of money repayable on demand or in single bullet repayment under that subsubitem which is in excess of zero point one per cent (0.1%) is remitted.

B **[25]** Under the remission order, the instrument which is entitled for a remission is an instrument which fulfilled the following criteria:

(i) loan agreement or loan instrument without security repayable on demand; or

C (ii) loan agreement or loan instrument without security repayable in single bullet repayment.

[26] It is not in dispute that the respondent's facility agreement is secured by the LOU from the Penang State Government as provided in the conditions precedent of the letter of offer dated 6 May 2019 and para. (D)(1) of the
D Third Schedule to the facility agreement:

> Third Schedule
>
> (D) Others
>
> (1) Letter of Undertaking from Penang State Government *via* Jabatan Kewangan Negeri to Ministry of Finance that the State Government is
E to be accountable for the Facility of RM100,000,000.00 with the Bank.
>
> …
>
> (4) any other Conditional Precedents as stated in the Letter of Offer dated 6 May 2019.

F **[27]** As a condition precedent to the facility agreement, the Penang State Government, through the Jabatan Kewangan Negeri, issued the LOU dated 9 August 2019, where the Penang State Government had given an assurance to the MOF that the Penang State Government will be accountable for the loan facility amounting to RM100 million granted by the Bank Islam. In the
G said letter, the Penang State Government clearly stated that:

> 3. Sehubungan itu, Kerajaan Negeri memberi akujanji untuk bertanggungjawab sepenuhnya ke atas Pinjaman Kredit Tidar berjumlah RM100 juta daripada Bank Islam Malaysia Berhad tersebut.

H **[28]** However, the respondent took the position that the LOU by the Penang State Government addressed to the MOF dated 9 August 2019 is not a security because the LOU is only between the Penang State Government and the Federal Government and the bank is not privy to the State LOU. Further, it was contended that the LOU is merely a "letter of compliance" or a "letter of assurance" to the MOF that the State Government is
I responsible for the loan. Further, it was also contended that the LOU did not create any charge, pledge or assign any assets as a collateral for the facility.

[29] The respondent relied on a decision of this court in *Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem* [2017] 10 CLJ 66, which was accepted by the learned judge that in determining whether or not an instrument is a 'security' for the purpose of the Stamp Act, the court should enquire whether the instrument is an encumbrance on property with which the lender can rely on to enforce and to recover the sum loaned under credit facility. If the answer is in the affirmative, then that instrument is a 'security'. Conversely, if the answer is in the negative, that instrument cannot amount to a security under the Stamp Act.

[30] The learned judge held that LOU issued by the State is more like a letter of assurance, and therefore the bank cannot rely on this LOU to ensure repayment of the loan, given the absence of a direct contractual relationship between the bank and either the State Government or the MOF. Consequently, the letter of undertaking cannot be considered a form of security under the Stamp Act.

[31] The learned judge relied on the following paragraphs in *Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem* (*supra*) as the basis of her decision:

> [60] Coming back to the word "security", *Lexis Nexis publication of Words, Phrases and Maxims - Legally and Judicially Defined* (vol. 13) defines it to mean as follows:
>
> > A security is an encumbrance, vested in a creditor, over the property of his debtor, for the purpose of securing the repayment of a debt. It is a right in the property of another, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, to realise it from that property. The purpose of a security is to ensure, of (*sic*) facilitate, the fulfilment, or enjoyment, of some other right vested in its owner. Securities may be classified into:
> >
> > (i) mortgages;
> >
> > (ii) pawns;
> >
> > (iii) floating charges;
> >
> > (iv) lien.
> >
> > This word has a variety of meaning:
> >
> > (i) the general name for all mortgages, charges, debentures, *etc*, whereby repayment of money is assured or secured;
> >
> > (ii) any document by which any claim may be enforced.
>
> [61] Going by this definition, the negative pledge by the appellant is certainly not a security as it is not an encumbrance vested in Maybank over the properties of the appellant, nor does it vest in Maybank a right over the properties which enables Maybank to realise the loan amount

A from the properties in the event of default by the appellant. Being a mere pledge not to encumber properties and nothing more, there is no property for the respondent to realise in the event of default.

[62] The true legal effect of the negative pledge given by the appellant is that it merely created an obligation not to encumber. It does not provide
B an obligation to repay any sum or sums of money in any way whatsoever. This is to be contrasted with that of a charge, mortgage or guarantee. In these instruments, upon the occurrence of an event of default, the sums of money become due and payable and failure to pay will expose the assets encumbered to foreclosure proceedings to redeem the loan sums.

C [63] We agree with learned counsel for the appellant that in the event of default by the appellant, Maybank will be considered as an unsecured creditor and will be equal in right of payment *ie*, *pari passu vis-a-vis* the other creditors. It is therefore incorrect for the learned judge to hold the view that the negative pledge by the appellant assured or guaranteed Maybank of payment in the event of default.

D [64] It is an undisputed fact that the appellant did not pledge any tangible asset or property as security that can be disposed of, sold or converted to cash to pay for the facility. The learned judge however did not consider this as negativing the element of "security" in the facility agreement ...

[32] However, we take a different view. We are of the considered opinion
E that the factual matrix of the above case is different from the present appeal. In *Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem* (*supra*), the issue is whether a negative pledge in a banking facility agreement was a 'security' within the meaning of para. 2 of the remission order. Under the facility agreement in that case, the security documents included the negative pledge
F given by the appellant, which was in the following terms:

NOW IN CONSIDERATION OF THE FOREGOING, WE HEREBY COVENANT AND UNDERTAKE that so long as any part of the facility, profit, dividend, income, yield and any other fees, commission, cost or other charges relating thereto and any monies secured herein shall remain
G outstanding, we shall NOT without your written consent:

(a) create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set-off or any other security interest on the whole or any part of our present or future assets other than:

H (i) liens arising in the ordinary course of business or by operation of law; and

(ii) security interests existing at the date hereof provided the same has been disclosed to you prior to the date hereof and subject to the amount outstanding and secured thereby at all times and at any time hereafter not exceeding the amount so disclosed at
I the date hereof ...

[33] The court then held that the negative pledge by the borrower is certainly not a security as it is not an encumbrance vested in Maybank over the properties of the borrower, nor does it vest in Maybank a right over the properties which enables Maybank to realise the loan amount from the properties in the event of default by the appellant.

[34] In the context of a normal commercial transaction between a bank and its borrower, the loan is normally secured by a security, normally an encumbrance over the properties of the borrower, as the bank would not release its monies without any security.

[35] However, we are of the considered opinion that this court in *Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem* (*supra*), did not seek to apply a restrictive definition to the word security. This can be seen from paras. [65] and [66] of the case, where the court had referred to the trial judge's reference to dictionary meaning of the word security:

> [65] *The Concise Oxford Dictionary* (9th edn) which the learned judge referred to in the first paragraph of the above passages gives five different meanings to the word "security", as follows:
>
> > 1. a secure condition or feeling. *2. a thing that guards or guarantees.* 3. a. the safety of a state, company *etc.*, against espionage, theft, or other danger. b an organization for ensuring this. *4. a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default.* 5. (often in pl) a certificate attesting credit or ownership of stock, bonds, *etc.*
>
> [66] Of the five meanings, *only meanings 2 and 4 are relevant, but even then they speak of "a thing" that guards or guarantees, or deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default.* (emphasis added)

[36] Applying the dictionary definitions to the facts of the case, the court then held in para. [67] of the judgment that a negative pledge "cannot by any stretch of the imagination refer to "a thing that guards or guarantees", nor is it "a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default." There was nothing deposited and there is nothing to forfeit …"

[37] The court then held that the negative pledge will not help Maybank in any way towards recovery of the debt. The negative pledge does not create such obligation because it is merely a contractual obligation not to charge or encumber any asset and not an obligation to repay any sum or sums of money on demand. And in the event of default, nothing arises from the terms of the negative pledge and it does not make the sum or sums of money repayable on demand. As such, there is no "security" in the form of "a guarantee of the fulfilment of an undertaking or the payment of the loan" (see paras. 74 and 75).

[38] In the present appeal, we are of the considered opinion that the word 'security' must be given a wide meaning. In *Stroud's Judicial Dictionary of Words and Phrases* (7th edn):

> A 'security', speaking generally, is anything that makes the money more assured in its payment or more readily recoverable …

Black's Law Dictionary (10th edn) defines security as:

> Collateral given or pledged to guarantee the fulfilment of an obligation; esp., the assurance that a creditor will be repaid (usu. With interest) any money or credit extended to a debtor.

[39] In the facility agreement itself, "security" is defined as:

> the security provided by the Security Party to the Bank in respect of the obligations and liabilities of the Customer (including but not limited to the payment of the Indebtedness) under and in connection with the Facility and particularized in Section 7 of the First Schedule and **any other security for the time being or from time to time constituting security for the obligations and liabilities** (including but not to limited to the payment of the indebtedness) of the Customer under and in connection with the facility. (emphasis added)

[40] However, under the Third Schedule – The Conditions Precedent (which is to be taken and construed as an integral part of this agreement), para. D provides that the security for the loan was the LOU from the Penang State Government *via* Jabatan Kewangan Negeri to Ministry of Finance that the State Government is to be accountable for the facility of RM100,000,000 with the bank.

[41] Therefore, despite the respondent's reliance on both the letter of offer and the facilities agreement stating "Security: Nil", we must read both documents as a whole. Having considered both documents as a whole, we find that the conditions precedent of the letter of offer dated 6 May 2019 and para. (D)(1) of the Third Schedule to the facility agreement clearly stated the requirement of the LOU issued by Penang State Government *via* the Jabatan Kewangan Negeri to MOF that the State Government is to be accountable for the facility of RM100,000,000 with the bank.

[42] Added to that, this court in *Muhibbah Engineering (M) Bhd v. Pemungut Duti Setem* (*supra*) also held that for the purpose of the term "security" in the remission order, the court should not be concerned with the loan instrument, that is, the facility agreement itself, but rather the nature of the negative pledge. This is because the words "without security" in the remission order come after the words "loan agreement or loan instrument". This can only be construed as to mean a security that is separate from and not part of the loan instrument itself. It refers to a separate security instrument. In para. [24] of the judgment, the court added:

> [24] *The legislative intent clearly is for the security to be collateral or secondary to that of the loan agreement or loan instrument.* To construe otherwise would be to render the Remission Order redundant and will not be applicable in any circumstance as the loan agreement or loan instrument would then, by itself, constitute "security" in any event and in every case. In our view, that construction will defeat the object of the Remission Order rather than to put its object into effect.
>
> [25] We agree with learned counsel for the appellant that the loan agreement is not the operative instrument for the purposes of the Remission Order because the loan agreement is already subject to stamp duty and is the main instrument falling under sub-sub item 22(1)(b) of the First Schedule to the Stamp Act. *What the Remission Order is concerned with is whether or not the loan agreement or loan instrument is supported by another instrument that creates an obligation "for any sum or sums of money repayable on demand or in single bullet repayment".* (emphasis added)

[43] In paras. [71] and [72] of the judgment, the court held that for the purposes of the remission order, it is important to reiterate the importance of an instrument independent of the facility agreement, which secures an obligation to secure a sum or sums of money on demand. Therefore, the court held that the matter of concern for the remission order is not the loan agreement or loan instrument itself but whether there is in existence another instrument that creates an obligation to pay a sum or sums of money on demand or in a single bullet payment. It is only where such instrument exists that entitlement to a remission of stamp duty is excluded by the remission order.

[44] Therefore, for the purposes of the remission order, there must be a separate instrument that creates an obligation "for any sum or sums of money repayable on demand or in single bullet repayment". And the intent and purpose of that separate instrument must be ascertained whether it falls within the ambit of the remission order.

[45] We are therefore of the considered opinion that the LOU issued by the Penang State Government to the MOF on 9 August 2019 is a separate instrument that serves as a clear assurance that the State Government will take full responsibility for the loan amount.

[46] The intent and purpose of the LOU is the Penang State Government's undertaking to be responsible for the loan and it explicitly secures the repayment of the loan facility to the bank. As a result of this assurance provided to the MOF, the payment of the RM100 million facility is guaranteed by the State Government. Additionally, the LOU provides a guarantee to the bank that the respondent has the capability to repay the loan amount at all times. Thus, the LOU serves as security for the facility agreement in multiple ways.

[47] Even though the LOU is a letter between the Penang State Government and the MOF, it explicitly guarantees the entire RM100 million loan provided by the bank to the respondent. The LOU from the Penang State Government provides an exceptional security and a complete assurance for the repayment of the loan amount. The State Government bears full responsibility for the loan amount, and as such, ensures that agencies under its jurisdiction, such as the respondent, maintain strong financial capability at all times to enable the repayment of the loan amount to the bank.

[48] Parties have also conceded that the issue of enforcement is not the issue for consideration here. Thus, as to how the security, in the nature of the LOU is to be enforced, is not a consideration in this appeal.

[49] In the present appeal, the facility agreement is secured by the LOU issued by the State Government to the MOF. The bank is a Federal Government GLC, whilst the respondent is a State entity. Hence, the relationship between the bank and the respondent is not strictly commercial, but are guided by Government policies. Therefore, instead of the usual security in the nature of mortgages or charges, the letter of offer issued by the bank specified the requirement of a LOU from the State Government, in compliance with the Federal Government policy. This is also clearly stated in the Third Schedule of the facilities agreement.

Conclusion

[50] For the aforesaid reasons, we find merits in the appeal as the LOU issued by the State Government constitutes a security for the said RM100 million loan. We are of the considered opinion that the learned judge has erred in law when she concluded that a 'security' is limited to instruments which form an encumbrance on property which the lender can rely on for the purpose of securing the repayment of a debt. The learned judge failed to appreciate that the word 'security' in the remission order has a wider meaning where it also includes the undertaking and guarantee provided by a third party. Therefore, since the loan instrument is secured by the Penang State Government's LOU, it does not fall within the remission order. The appeal is allowed with costs and the decision of the learned High Court Judge is set aside.